UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

v. S8 16 Cr. 361(CS)

TYRIN GAYLE,

Defendant.

----------x

United States Courthouse
White Plains, N.Y.
September 18, 2017
1:10 p.m.

Before:

THE HONORABLE CATHY SEIBEL,

District Judge

APPEARANCES

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
MAURENE COMEY
LAUREN SCHORR
JACQUELINE KELLY
Assistant United States Attorneys

FASULO, BRAVERMAN & DiMAGGIO, LLP
Attorneys for Defendant Tyrin Gayle
SAM BRAVERMAN
LOUIS FASULO
MICHAEL GIORDANO

(In open court; case called)

THE COURT: Did we make whatever the change was?

THE CLERK: There were no changes.

THE COURT: Oh.

THE CLERK: We heard there were no changes.

MS. COMEY: One thing did come up this morning while we were preparing this exhibits.

The surveillance video, which is Exhibit 213 from February 21st, requires a special software to play. That software is not available on the laptop that we have to send back to the jury room. So, for that reason, that video alone we can only play out here in the courtroom.

THE COURT: Is that the white car going back and forth?

MS. COMEY: Yes, your Honor.

THE COURT: In other words, the one that they're probably really going to want to see.

MS. COMEY: Yes, your Honor.

THE COURT: That's Exhibit 213, so I'll just tell them what you just said.

Okay. Let's get the jury in.

(Jury present)

THE COURT: Good afternoon, everyone. I hope you-all had a good weekend.

It is now time for me to give you your instructions on

the law. They're sort of lengthy. By statute, I have to give them to you verbally, but I think it's a lot of information to take in through the ears. So, I'm going to hand out copies so you can read along with me.

Before I do that, though, one ground rule, which is, I ask that you stay on the same page with me literally. If you miss something and want to go back, you'll have time to do that afterwards.

Please don't read ahead, because the one thing I think is a recipe for confusion is if what you're hearing through your ears and seeing with your eyes are two different things. Let's read through it together. And you'll be able to keep copies of these instructions and refer to them during your deliberations.

And now I will hand out copies to everyone. Are they still warm?

A JUROR: Yes.

THE COURT: Feels good. I know we should put space heaters in the jury box. All right.

It seems like a lot of information. It is a lot of information, but as I said, you'll be able to refer to it in the jury room. And you'll also each get a copy of a verdict form, which will list the questions you have to answer and I think will help you organize your deliberations.

Don't freak out if it seems like a lot or if you don't

get something on the first read-through.

Starting on page one, Members of the Jury, we have almost reached that point where you are about to begin your final function as jurors, which, as you all appreciate, is one of the most important duties of citizenship in this country. My instructions to you will be in four parts.

First, I will give some introductory instructions about the role of the Court and the jury, and about the presumption of innocence and the government's burden of proof. Second, I will give you instructions concerning the evaluation of evidence. Third, I will describe the charges and the law governing those charges, which you will apply to the facts as you find them to be established by the proof. The fourth and final section of these instructions will relate to your deliberations.

It is my duty to instruct you as to the law, and it is your duty to accept these instructions of law and apply them to the facts as you determine them.

A JUROR: Pardon me, Judge. I think I have all the verdict sheets here.

THE COURT: So you do.

THE LAW CLERK: My apologies.

THE COURT: All right. You want to catch up. We're just at the middle of page one. Sorry about that.

It's my duty to instruct you as to the law, and it's

your duty to accept these instructions of law and apply them to the facts as you determine them.

If an attorney stated a legal principal different from any that I state to you in my instructions, it is my instructions you must follow. You should not single out any instruction as alone stating the law, but should consider my instructions as a whole when you retire to deliberate. You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion you may have about what the law may be or ought to be. It would be a violation of your oath to base your verdict on any view of the law other than that which I give you.

You, the Members of the Jury, are the sole and exclusive judges of the facts. You pass on the evidence, determine the credibility of witnesses, resolve such conflicts as there may be in the testimony, draw whatever reasonable inferences you decide to draw from the facts as you determine them, and determine the weight of the evidence. In doing so, remember that you took an oath to render judgment impartially and fairly, based solely on the evidence and the applicable law.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that given to any other party to this litigation. By the same token, the government is entitled

to no less consideration.

The defendant has pleaded not guilty to the charges against him. As a result of a plea of not guilty, the burden is on the government to prove guilt beyond a reasonable doubt as to each charge. This burden never shifts to the defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of testifying or calling any witness or locating or producing any evidence.

The law presumes the defendant to be innocent of each of the charges against him. This means the defendant began the trial here with a clean slate. The presumption of innocence alone is sufficient to acquit, unless you, as jurors, are unanimously convinced beyond a reasonable doubt of the defendant's guilt. This presumption was with the defendant when the trial began, remains with the defendant now, and will remain with the defendant during your deliberations, unless and until you are convinced that the government has proven the defendant's guilt beyond a reasonable doubt.

The question that naturally arises is, "What is a reasonable doubt?" What does that term mean? The words almost define themselves. It is a doubt based on reason and arising out of the evidence in the case or the lack of evidence. It is a doubt that a reasonable person has after carefully weighing all of the evidence in the case.

Proof beyond a reasonable doubt must therefore be of

such a convincing character, that a reasonable person would not hesitate to rely on it in making an important decision. Reasonable doubt is a doubt that appeals to your reason, your judgment, your experience, and your common sense.

If, after a fair and impartial consideration of all of the evidence, you can candidly and honestly say that you are not satisfied with the guilt of the defendant, that you do not have an abiding and firm belief that the government has proven the defendant's guilt - in other words, if you have such a doubt as would reasonably cause a prudent person to hesitate in acting in matters of importance in his or her own affairs - then you have a reasonable doubt, and in that circumstance, it is your duty to acquit.

If, on the other hand -- sorry.

On the other hand, if, after a fair and impartial consideration of all the evidence as applied to each element of each count, you can candidly and honestly say that you do have an abiding and firm belief that the government has proven the defendant's guilt - such a belief as a prudent person would be willing to act upon in important matters in the personal affairs of his or her life - then you have no reasonable doubt, and under such circumstances, it is your duty to convict.

Reasonable doubt is not whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. Nor is it sympathy for the defendant. Beyond a reasonable

doubt does not mean a positive certainty, or beyond all possible doubt. After all, it is virtually impossible for a person to be absolutely and completely convinced of any contested fact that by its nature is not subject to mathematical proof and certainty. As a result, the law in criminal cases is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

You are to consider only the evidence in the case. The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, and any stipulations to which the parties have agreed.

A stipulation is simply an agreement between parties as to what certain facts were or what the testimony would be if certain people testified before you. The stipulations are the same for your purposes as the presentation of live testimony. You should be consider the weight to be given such evidence, just as you would any other evidence.

It is for you alone to decide the weight, if any, to be given to the testimony and stipulations you have heard and the exhibits you have seen. Testimony that I have excluded or stricken is not evidence and may not be considered by you in rendering your verdict. If testimony was received only for a limited purpose, you must follow that limiting instruction and consider the evidence only for the purpose I indicated.

You are not to consider as evidence questions asked by the lawyers. It is the witnesses' answers that are the evidence, not the questions. Arguments by the attorneys are not evidence because the attorneys are not witnesses. What they have said to you in their opening statements and their summations is intended to help you understand the evidence to reach your verdict. If, however, your recollection of the evidence differs from the statements made by the advocates in their opening statements or summations, it is your recollection that controls.

Finally, any statements or rulings that I may have made do not constitute evidence. Because you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to what the facts are or what the verdict should be. The rulings I have made during the trial are not any indication of my views. Also, you should not draw any inference from the fact that I may, on occasion, have asked certain questions of witnesses. Those questions were intended only to clarify or expedite, and are not an indication of my view of the evidence. In short, if anything I have said or done seemed to you to indicate an opinion relating to any matter you need to consider, you must disregard it.

You are to make your decisions based on all of the evidence in the case. It does not matter which side called the witness or introduced an exhibit; all the evidence should be

weighed. But I remind you that the defendant has no obligation to introduce any evidence.

There are two types of evidence you may properly consider in reaching your verdict. One type of evidence is direct evidence. One kind of direct evidence is a witness' testimony about something he or she knows by virtue of his or her - should be in there - own senses - something the witness has seen, felt, touched or heard. Direct evidence may also be in the form of an exhibit.

The other type of evidence is circumstantial evidence. Circumstantial evidence is evidence that tends to prove one fact by proof of other facts. Here is a simple example of circumstantial evidence:

Assume that when you came into the courthouse this morning, the sun was shining and it was a nice day. Assume that the courtroom blinds are drawn and you cannot look outside. As you are sitting here, someone walks in with an umbrella that is dripping wet. Somebody else then walks in with a raincoat that is also dripping wet. You cannot look outside the courtroom and you cannot see whether or not it is raining, so you have no direct evidence of that fact, but on the combination of the facts that I've asked you to assume, it would be reasonable and logical for you to conclude that between the time you arrived at the courthouse and the time these people walked in, it had started to rain.

That is all there is to circumstantial evidence. You infer on the basis of reason, experience, and common sense an established fact from the existence or the nonexistence of some other fact.

Many facts, such as a person's state of mind, can only rarely be proved by direct evidence. Circumstantial evidence is of no less value than direct evidence. The law makes no distinction between the two, but simply requires that before convicting the defendant, you, the jury, must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

I've used the term "infer," and the lawyers in their arguments have asked you to draw inferences. When you draw an inference, you conclude, from one or more established facts, that another fact exists, and you do so on the basis of your reason, experience, and common sense. The process of drawing inferences from facts in evidence is not a matter of guesswork, suspicion, or speculation. An inference is a reasoned, logical deduction or conclusion that you, the jury may draw - but are not required to draw - from the facts which have been established by either direct or circumstantial evidence. In considering inferences, you should use your common sense and draw from the facts that you find to be proven whatever reasonable inferences you find to be justified in light of your experience. As I will explain in more detail later, however,

you must not infer that the defendant is guilty of criminal conduct merely because he associates with others who may have engaged in such conduct, even if he knows that a crime has occurred.

You have heard witnesses testify during trial regarding the chain of custody of certain evidence, including issues relating to the collection and preservation of evidence, and the procedures followed by particular agencies and technicians. With respect to cellphones, you have heard evidence regarding the extraction of information from cellphones, the placement of that information on other media, and the generation of reports of the information on that media. I have admitted these exhibits, including the media and corresponding reports into evidence, but the integrity of the chain of custody, along with any weaknesses or gaps you may perceive in the chain of custody, is something you may consider in evaluating the weight, if any, to be given to this evidence.

Now, for the important subject of evaluating testimony. How do you evaluate the credibility or believability of the witnesses? The answer is that you use your plain, common sense. There is no magic formula by which you can evaluate testimony. You should use the same tests for truthfulness that you would use in determining matters of importance in your everyday lives. You should ask yourselves: Did the witness impress you as honest, open, and candid, or was

the witness evasive and edgy as if hiding something? How did he or she appear - that is, his or her bearing, behavior, manner, and appearance while testifying? How responsive was the witness to the questions asked on direct examination and on cross-examination? You should consider the opportunity the witness had to see, hear, and know about the things about which he or she testified; the accuracy of his or her memory; his or her candor or lack of candor; his or her intelligence; the reasonableness and probability of his or her testimony; its consistency or lack of consistency with other credible evidence; and its corroboration or lack of corroboration by other credible evidence.

In short, in deciding credibility, you should size up the witness in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Use your common sense, good judgment, and life experience.

Few people recall every detail of every event precisely the same way. A witness may be inaccurate, contradictory, and even untruthful in some respects, and yet entirely believable and truthful in other respects. It is for you to determine whether such inconsistencies are significant or inconsequential.

If you find that a witness intentionally testified falsely, that is always a matter of importance you should weigh carefully. If you find that any witness has willfully

testified falsely as to any material fact - that is, as to an important matter - the law permits you to disregard completely the entire testimony of that witness upon the principal that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of his or her testimony as you deem true and disregard what you feel is false.

You are not required to accept testimony even though the testimony is uncontradicted and the witness' testimony is not challenged. You may decide because of the witness' bearing or demeanor or because of the inherent improbability of the testimony, or for other reasons sufficient to yourselves, that the testimony is not worthy of belief. On the other hand, you may find, because of a witness' bearing and demeanor, the plausibility of the testimony, and the other evidence in the case, that the witness is truthful.

By the processes that I've just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept, and what weight you will give to it.

In deciding whether to believe a witness, you should also specifically note any evidence of bias, hostility, or affection that the witness may have toward one of the parties. Likewise, you should consider evidence of any other interest or

motive that the witness may have in cooperating or not cooperating with a particular party. If you find any such bias, hostility, affection, interest, or motive, you must then consider whether it affected or colored the witness' testimony.

You should also take into account any evidence that a witness may benefit or suffer in some way from the outcome of the case. Such interest in the outcome may create a motive to testify falsely and may sway a witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in find when evaluating the credibility of his or her testimony and accept it with great care.

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are people who, no matter what their interest in the outcome of the case may be, would not testify falsely. It is for you to decide based on your own perceptions and common sense to what extent, if at all, the witness' bias or interest has affected his or her testimony. You are not required to disbelieve an interested witness. You may accept as much of his or her testimony as you deem reliable and reject as much as you deem unworthy of acceptance.

You have heard several witnesses who testified that they were actually involved in certain of the crimes charged in

the indictment or in other serious crimes.

You may properly consider the testimony of such accomplices or cooperating witnesses - to whom I will refer as cooperators. The government frequently must rely on the testimony of cooperators who admit participating in alleged crimes to detect and prosecute wrongdoers.

Because of the possible interest a cooperator may have in testifying, however, his testimony - in this case, they were all "hes" - his testimony should be scrutinized with special care and caution. The fact that a witness is a cooperator can be considered by you as bearing upon his credibility. It does not follow, however, simply because a person has admitted to participating in one or more crimes, that he is incapable of giving a truthful version of what happened.

Like the testimony of any other witness, cooperating witness testimony should be given such weight as it deserves in light of the facts and circumstances before you, taking into account the witness' demeanor and candor, the strength and accuracy of his recollection, his background, and the extent to which the testimony is or is not corroborated by other evidence in the case.

You may consider whether a cooperator - like any other witness called in this case - has an interest in the outcome of the case or a motive to testify falsely, and if so, whether it has affected his testimony.

In evaluating the testimony of cooperating witnesses, you should ask yourselves whether they would or believe they would benefit more by lying or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would best be served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one that would cause him to lie or was it one that would cause him to tell the truth? Did this motivation color his testimony?

You heard testimony about various agreements between the government and the witnesses. You should not be concerned with why the government made an agreement with a witness. Your sole concern is whether a witness has given truthful testimony here in this courtroom before you. In making that determination, you may consider the terms of the agreement between the witness and the government, and all the surrounding facts and circumstances.

If you find that the testimony was false, you should reject it. If, however, after a cautious and careful examination of a cooperator's testimony and demeanor on the witness stand, you are satisfied that the witness told the truth, you should accept it as credible and act on it accordingly.

As with any witness, let me emphasize that the issue of credibility need not be decided in an all-or-nothing fashion. Even if you find that a witness testified falsely in one part, you still may accept his testimony in other parts or you may disregard all of it. That is a determination entirely for you.

You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that one or more prosecution witnesses pleaded guilty to similar charges. The decision of those witnesses to plead guilty was a personal decision those witnesses made about their own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

You've heard evidence that a witness made a statement on an earlier occasion which counsel argued is inconsistent with the witness' trial testimony. Unless the prior statement was sworn testimony or is the statement of a party, evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on the guilt of the defendant. Evidence of the prior inconsistent statement was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her

trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so, how much, if any, weight is to be given to the inconsistent statement -- sorry, let me try that again.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so, how much, if any, weight to be given to the inconsistent statement in determining the credibility of the witness.

The defendant in this case did not testify. Under our Constitution, a defendant in a criminal case has no obligation to testify or to present any evidence, because it is the government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he is innocent.

Therefore, you must not attach any significance to the

fact that the defendant did not testify. No adverse inference against the defendant may be drawn by you because he did not take the witness stand, and you may not consider that fact in any way in your deliberations in the jury room.

You have heard testimony of some witnesses who were law enforcement officers during the events at issue in this trial. The law is that the testimony of a witness who is or was employed by the government is not deserving of more or less consideration or greater or lesser weight than that of any other witness.

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court. You may consider that fact when you are evaluating a witness' credibility, but there is nothing either unusual or improper about a witness meeting with lawyers before testifying. Such consultation conserves your time and the Court's time. In fact, it would be unusual for a lawyer to call a witness without such consultations. The weight, if any, you give to the fact or the nature of the witness' preparation for his or her testimony, or the number of times the witness met with the attorney, is a matter completely within your discretion.

The indictment alleges that certain acts occurred on or about various dates. It is not necessary, however, for the

government to prove that the alleged crimes were committed on exactly those dates. It is sufficient if the crimes charged are shown to have been committed on or within approximately the dates charged in the indictment.

I gave you various limiting instructions from time to time during the trial, and you must follow those instructions during your deliberations.

There's been testimony before you about the use of informants. Use of informants is lawful, and evidence obtained by the use of informants is properly considered by you. Whether you approve or disapprove should not enter into your deliberations.

You've heard testimony about evidence seized in searches of various people and places. Evidence obtained from these searches was lawful, properly admitted in this case, and may properly be considered by you. Whether you approve or disapprove of how it was obtained should not enter into your deliberations.

Audio and video recordings of various conversations and events have been admitted into evidence. Whether you approve or disapprove of the recording of those conversations may not enter your deliberations. I instruct you that these recordings were made in a lawful manner, that no one's rights were violated, that the government's use of this evidence is lawful, and that it was properly admitted into evidence at this

trial. You must, therefore, regardless of any personal opinions, give this evidence full consideration along with all the other evidence in the case in determining whether the government has proved beyond a reasonable doubt the guilt of the defendant.

You have heard what is called expert testimony from various witnesses. Actually, now that I think about it, just one, the chemist. An expert is allowed to express an opinion on those matters about which he has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider the expert's qualifications, opinions, and reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony.

You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness' testimony merely because he is an expert, nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

It is the duty of the attorney for each side of the

case to object when the other side offers testimony or other evidence which the attorney believes is not admissible. Counsel also have the right and duty to ask the Court to make rulings of law. All those questions of law must be decided by me. You should not show any prejudice against an attorney, or his or her client, because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury, or asked the Court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. If, however, I sustained an objection to any evidence or if I offered evidence stricken, that evidence must be entirely ignored.

You may not draw any inference, favorable or unfavorable, toward the government or the defendant from the fact that any person was not named as a defendant in this case, and you may not speculate as to the reasons why other people are not on trial before you now.

There are people whose names you heard during the course of the trial, but who did not appear to testify. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you

should not draw any inferences or reach any conclusions about what they would have testified to had they been called. Their absence should not affect your judgment in any way. You should remember my instruction, however, that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

You heard reference, in the arguments and cross-examination of defense counsel in this case, to the fact that certain investigative techniques were or were not used by the government or particular investigative steps were or were not taken by the government. There is no legal requirement that the government prove its case through any particular means. While you are to carefully consider the evidence adduced by the government and whether it is sufficient, you are not to speculate as to why they used the techniques they did or why they did not use other techniques. The government is not on trial. Your concern is to determine whether, on the evidence or lack of evidence, the government has proven its case beyond a reasonable doubt.

Some of the exhibits were charts, tables, and maps. They are not direct evidence. They are summaries of the evidence. They are a visual representation of information or data as set forth either in the testimony of a witness or in a stipulation or in documents. They're admitted as aids to you in your deliberations.

It is up to you whether those charts fairly and correctly present the information in the testimony and the documents. To the extent the charts conform to what you determine the underlying evidence to be, you may accept them.

The question of possible punishment of the defendant may not enter into or influence your deliberations. The duty of imposing a sentence rests exclusively upon the Court. That means me. Your function is to weigh the evidence in the case and to determine whether the defendant is guilty as to each charged count beyond a reasonable doubt, solely on the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant, if he is convicted, to influence your verdict in any way or in any sense enter into your deliberations.

Let us now turn to the charges in the indictment against the defendant Tyrin Gayle, also known as "Spazzo."

I remind you that the indictment merely describes the charges made against the defendant. It is an accusation. It is not evidence. I will first summarize the offenses charged in the indictment and then explain in detail the elements of each of the offenses. There are seven counts in the indictment.

Count One is a charge of conspiracy to violate the Racketeer Influenced and Corrupt Organizations, or RICO, Act. It alleges that from at least in or about 2015, up to and

including about May 2016, the defendant and others conspired, or agreed, to conduct and participate in the conduct of the affairs of a racketeering enterprise - named in the indictment as the Yellow Tape Money Gang, or "YTMG" - through a series of specific criminal acts alleged to constitute a pattern of racketeering activity, consisting of multiple acts involving murder, including conspiracy to murder and attempted murder, in violation of New York Penal Law Sections 20.00, 105.15, 110.00, and 125.25, and the distribution of controlled substances including, crack cocaine and heroin, in violation of Sections 812, 841(a)(1), 841(b)(1)(A), and 846 of Title 18 of the United States Code.

Don't panic, I'm going to explain all of that.

Count Two charges that on December 11, 2015, the defendant attempted to murder, and aided and abetted the attempted murder of, members of a rival gang in the vicinity of South Street and Liberty Street in Newburgh, New York, in aid of the activity of YTMG.

Count Three alleges that on February 21, 2016, the defendant assaulted and attempted to murder, and aided and abetted the assault and the attempted murder of, an individual in the vicinity of South Street and Chambers Street in Newburgh, New York, in aid of the activity of YTMG.

Count Four charges that from in or about 2015, through May 2016, the defendant conspired (that is, agreed) to

distribute and possess with intent to distribute at least 280 grams of crack cocaine.

Count Five charges that from in or about 2015 through May 2016, the defendant employed a minor in the commission of a drug offense.

Count Six charges that from in or about 2015 through May 2016, the defendant used, carried, possessed, brandished, and discharged firearms, and aided and abetted the use, carrying, possession, brandishing, and discharge of firearms during, and in relation to, the racketeering conspiracy charged in Count One and the narcotics conspiracy charged in Count Four.

Count Seven charges that in or about 2017, the defendant attempted to obstruct justice by tampering with a witness.

I will go over each of these counts, and the elements of each, in more detail in a few minutes, but first I will explain the structure of the charges and theories of criminal liability.

As you can tell, the indictment contains several charges - charges, for example, involving narcotics distribution, attempted murder, and firearms use. The government, as it is entitled to do, has brought charges relating to the same underlying conduct under more than one criminal statute, and therefore, you might say under more than

one theory of criminal liability. For example, the alleged distribution of drugs, that is the basis of the conspiracy charged in Count Four, can also be considered as part of the alleged pattern of racketeering in Count One.

A consequence of the indictment containing charges brought under multiple statutes is that you will need to be instructed on the legal elements and principals applicable to each statute and theory of liability. I will be instructing you on the legal elements, definitions, and principals applicable to each type of charge. In other words, I will provide you with all the instructions you need to decide whether the government has proven beyond a reasonable doubt each of the necessary elements on each of the charges in the indictment.

You will need to consider each charge against the defendant separately and determine whether the government has carried its burden of proof with respect to that charge.

I will provide you with a verdict form, and you will need to report on the verdict form the results of your deliberations on each count. To do so, you will need to keep track during your deliberations of which charge you are considering, and, even more specifically, the legal elements applicable to the charge. You should be able to do that using the copies of my instructions and of the verdict form that you will have with you in the jury room. You may also have seen

that these instructions contain a detailed table of contents, so as you consider each count, you will easily be able to find the discussion of that count, including the elements the government must prove beyond a reasonable doubt and an explanation of these elements. The verdict form will be helpful in organizing your discussion and keeping track of your decisions.

There are generally three theories under which a defendant can be found guilty of -- we left that word out -- can be found guilty of criminal conduct: personal liability, aiding and abetting liability, or *Pinkerton* or co-conspirator liability.

Personal liability is just like it sounds. A defendant can be found guilty of criminal conduct if the government proves that he himself personally committed the charged offense.

Aiding and abetting liability means that a defendant can be found guilty if the government proves that the defendant aided and abetted another person who committed the charged offense. I will instruct you on the elements of aiding and abetting liability in a moment.

Finally, *Pinkerton* liability - so called because it was discussed in a case called *Pinkerton v. United States* - refers to the law that under certain circumstances, a jury may, but is not required to, hold a member of a conspiracy liable

for a crime committed by a co-conspirator. Before you consider *Pinkerton* liability as to a particular count, you must first consider whether the defendant was actually part of a conspiracy with the person who personally committed the crime. To this end, and before I instruct you on each count, I will now instruct you on the law of conspiracy.

The law of conspiracy applies to Count One, the charge of conspiracy to violate the RICO statute, and Count Four, the charge of conspiracy to distribute and possess with intent to distribute at least 280 grams of crack cocaine.

A conspiracy is a kind of criminal part partnership - an agreement of two or more persons to join together to accomplish some unlawful purpose.

Conspiracy simply means agreement. And the crime of conspiracy to violate a federal law is an independent offense, separate and distinct from the actual violation of any specific federal laws. Such actual violations are called "substantive crimes." You may find the defendant guilty of the crime of conspiracy even if you find that the substantive crimes which were the objects of the conspiracy were never actually committed. Congress has deemed conspiracy, standing alone, a separate crime, even if the conspiracy is not successful.

To sustain its burden of proof with respect to the RICO Conspiracy and Narcotics Distribution Conspiracy allegations, that is Counts One and Four, the government must

prove beyond a reasonable doubt the following two elements:

First, the existence of the charged conspiracy - that is, the existence of an agreement or understanding to commit the unlawful objects of such conspiracy; and

Second, that the defendant knowingly became a member of the conspiracy, with intent to further its illegal - that is, with the intent to achieve the illegal object of the charged conspiracy.

Now I will separately discuss each of these elements.

To prove the existence of a conspiracy, the government is not required to show that two or more people sat around a table and entered into a solemn pact, orally or in writing, stating that they had formed a conspiracy to violate the law and spelling out all the details. Common sense tells you that when people agree to enter into a criminal conspiracy, much is left to unexpressed understanding. It is rare that a conspiracy can be proven by direct evidence of an explicit agreement.

To show that a conspiracy existed, the evidence must show beyond a reasonable doubt that two or more persons in some way or manner, either explicitly or implicitly, came to an understanding to violate the law and to accomplish an unlawful plan.

In determining whether there has been an unlawful agreement as alleged in the indictment, you may consider the

actions of all the alleged co-conspirators that were taken to carry out the apparent criminal purpose. The only evidence that may be available with respect to the existence of a conspiracy is that of disconnected acts on the part of the alleged individual co-conspirators. When taken all together and considered as a whole, however, you may conclude - or may not, as your good judgment dictates - that that warrants the inference that a conspiracy existed just as conclusively as more direct proof, such as evidence of an express agreement.

The object of a conspiracy is the illegal goal that the conspirators agree or hope to achieve. I will describe the object of a particular conspiracy when instructing you on that conspiracy.

If you conclude that the government has proven beyond a reasonable doubt that the conspiracy you are considering existed, and that the conspiracy had as its object one of the illegal purposes charged in the indictment, then you must next determine whether the defendant intentionally participated in that conspiracy with knowledge of its unlawful purposes, and with the intent to further its unlawful objectives.

The government must prove beyond a reasonable doubt that the defendant knowingly and intentionally entered into the conspiracy with criminal intent - that is, with a purpose to violate the law - and that he agreed to take part in the conspiracy to promote and cooperate in its unlawful objectives.

"Unlawfully" simply means contrary to law. A defendant does not need to have known that he was breaking any particular law, but he must have been aware of the generally unlawful nature of his acts.

The terms "knowingly" and "intentionally" mean that to find that a defendant joined the conspiracy, you must conclude beyond a reasonable doubt that in doing so, he knew what he was doing; in other words, that the defendant took the actions in question deliberately and voluntarily. An act is done "knowingly" and "intentionally" if it is done deliberately and purposely; that is, the defendant's acts must have been the product of the defendant's conscious objective, rather than the product of a mistake or accident, or mere negligence, or some other innocent reason.

Science has not yet devised a manner of looking into a person's mind and knowing what that person is thinking. The government has introduced into evidence certain acts and conversations alleged to have taken place with the defendant or in his presence. The government contends that these acts and conversations show beyond a reasonable doubt the defendant's knowledge of the unlawful purpose -- I'm sorry -- the defendant's knowledge of the unlawful purposes of the conspiracy. The defendant denies that he was a member of the conspiracy.

It is not necessary for the government to show that

the defendant was fully informed as to all the details of the conspiracy for you to infer knowledge on his part. To have guilty knowledge, the defendant need not know the full extent of the conspiracy or all of the activities of all of its participants. It is not necessary for the defendant to know every other member of the conspiracy. In fact, the defendant may know only one other member of the conspiracy and still be a co-conspirator. Nor is it necessary for a defendant to receive any monetary benefit from his participation in the conspiracy, or have a financial stake in the outcome. It is enough if he participated as a conspirator unlawfully, intentionally, and knowingly as I have defined those terms.

The duration and extent of the defendant's participation has no bearing on the issue of the defendant's guilt. He need not have joined the conspiracy at the outset. With regard to liability for conspiracy (although not substantive offenses), the defendant may have joined the conspiracy at any time in its progress, and will still be held responsible for all that was done before he joined if those acts were reasonably foreseeable and within the scope of the defendant's agreement, and for all that was done during the conspiracy's existence while he was a member. Each member of a conspiracy may perform separate and distinct acts. Some conspirators play major roles, while others play minor roles in the scheme. An equal role is not what the law requires. In

fact, even a single act may be sufficient to draw the defendant within the scope of the conspiracy.

I want to caution you, however, that a person's mere association with a member of a conspiracy does not make that person a member of the conspiracy, even when that association is coupled with knowledge that a conspiracy is taking place. For example, mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, is not sufficient to support a conviction for conspiracy. In other words, knowledge without agreement and participation is not sufficient. What is necessary is that the defendant has participated in the conspiracy with knowledge of its unlawful purposes and with an intent to aid in the accomplishment of its unlawful objectives. A person may know, or be friendly with, a conspirator without being a conspirator himself. Mere similarity of conduct or the fact that persons may have assembled together and discussed common aims and interests does not necessarily establish membership in a conspiracy.

I also want to caution you that mere knowledge of or acquiescence to the unlawful plan - without participation in it - is not sufficient. Moreover, the fact that the acts of the defendant without knowledge merely happened to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. The defendant must have participated with knowledge of at least

some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

In sum, you must find beyond a reasonable doubt that the defendant, with an understanding of the unlawful nature of the conspiracy, intentionally engaged, advised or assisted in the conspiracy for the purpose of furthering an illegal undertaking. The defendant thereby becomes a knowing and willing participant in the unlawful agreement - that is to say, a conspirator.

A conspiracy, once formed, is presumed to continue until either its objective is accomplished or there is some affirmative act of termination by its members. Similarly, once a person is found to be a member of a conspiracy, he is presumed to continue his membership in the venture until its termination.

It is not essential that the government prove that a particular conspiracy alleged in the indictment started or ended on any of the specific dates described for that conspiracy. It is sufficient if you find that the conspiracy was formed and that it existed for some time around or within the dates set forth in the indictment.

You will see that the pattern of racketeering activity charged in Count One - which is the conspiracy to violate the RICO Act, which I will explain in more detail shortly - is

alleged to have included conspiracy to murder under New York Penal Law. Under New York Penal Law Section 105.15, a person is guilty of conspiracy to commit a crime when, quote, "with the intent that [such crime be committed], he agrees with one or more persons to engage in, or cause the performance of such conduct."

To find that a defendant participated in a conspiracy under New York law, the two elements of federal conspiracy I've just described must be met, and one additional element must be met, the so-called "overt act" requirement. New York Penal Law Section 105.20 provides, quote, "[a] person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy." An overt act is an independent act that tends to carry out the conspiracy, but need not necessarily be the object of the crime. There's no requirement under the RICO conspiracy or narcotics conspiracy laws that an overt act be committed, but New York's conspiracy law does not punish agreement alone without some proof that the co-conspirators intended to convert planning into action. The function of the overt act requirement is simply to manifest that the conspiracy is at work.

You may consider as evidence against the defendant the acts and statements of those who were co-conspirators of the defendant. The reason for this rule has to do with the nature

of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each member becomes an agent for the other conspirators in carrying out the conspiracy. Accordingly, the reasonably foreseeable acts, declarations, statements and omissions of any member of the conspiracy in furtherance of the common purpose of the conspiracy are deemed, under the law, to be the acts of all the members, and all the members are responsible for such acts, declarations, statements and omissions.

If you find, beyond a reasonable doubt, that the defendant was a member of a charged conspiracy, then any acts done or statements made in furtherance of that conspiracy by persons also found by you to have been members of that conspiracy may be considered. This is so, even if the acts were done or statements made in the defendant's absence and without his knowledge. But before you may consider the statements or acts of a co-conspirator in deciding the issue of the defendant's guilt, you must first determine that the acts and statements were made during the existence and in furtherance of the unlawful scheme. If the acts were done or the statements were made by someone whom you do not find to have been a member of the conspiracy, or if they were not said or done in furtherance of the conspiracy, they may not be

considered by you as evidence against the defendant.

We now turn to *Pinkerton* liability - that is, the theory under which a defendant who is a member of a conspiracy may be held liable for a crime committed by a co-conspirator. *Pinkerton* liability should be considered by you only in connection with Counts Two, Three and Six, and only if you do not find that the defendant personally committed or aided and abetted in the commission of those offenses.

If you find that the defendant was part of one of the conspiracies alleged in the indictment - that is, if you find that the government has proven beyond a reasonable doubt the elements I just described as to a particular conspiracy - then you may, but are not required to, find the defendant liable for a substantive offense committed by a co-conspirator, provided that the government has proven the following elements beyond a reasonable doubt:

First, that a crime charged in the substantive count you are considering was committed;

Second, that the person or persons you find actually committed the crime were members of the corresponding conspiracy you found existed;

Third, that the substantive crime was committed pursuant to the common plan and understanding you found to exist among the conspirators;

Fourth, that the defendant was a member of the

conspiracy at the time the substantive crime you are considering was committed (that is, the defendant had entered into the conspiracy); and

Fifth, that the defendant could reasonably have foreseen that the substantive crime you are considering might be committed by his co-conspirators.

If you find the government has proven all five of these elements beyond a reasonable doubt, then you may find the defendant guilty of a substantive offense charged against him, even if he did not personally participate in the acts constituting the crime, and even if he did not have actual knowledge of it.

Aiding and abetting liability is its own theory of criminal liability. In effect, it is a theory of liability that permits a defendant to be convicted of a specified crime if the defendant, while not himself committing the crime, assisted another person or persons in committing the crime. I will instruct you on both federal and New York aiding and abetting law because the indictment alleges aiding and abetting violations of both federal and New York statutes.

Under the federal aiding and abetting statute, quote, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." In other words, a person who aids or abets another to commit an offense is just

as guilty of that offense as if he committed it himself. Accordingly, you may find the defendant guilty of a crime if you find that the government has proven beyond a reasonable doubt that another person actually committed the crime and that the defendant aided and abetted that person in committing the crime.

As you can see, the first requirement is that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

To aid or abet another to commit a crime, it is necessary that the defendant knowingly associated himself in some way with the crime charged, and that he knowingly committed some act to contribute to the success of the crime. A person acts knowingly if he acts voluntarily and deliberately, and not because of mistake or accident, mere negligence or other innocent reason. The government must prove that the defendant engaged in some affirmative conduct for the specific purpose of bringing about the crime.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a

defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. To be found guilty, the government must prove that an aider and abettor took some conscious action that furthered the commission of the crime and that he did so with the intent to bring about the crime. To determine whether the defendant aided and abetting a crime, ask yourself: Did he participate in the crime charged as something he wished to bring about? Did he associate himself with the criminal venture knowingly? Did he seek by his actions to make the criminal venture succeed? If so, then the defendant is an aider and abettor, and therefore guilty of the offense. If not, then the defendant is not an aider and abettor, and therefore not guilty under an aiding and abetting theory.

You will see that the pattern of racketeering activity charged in Count One, which I'll explain in a few moments, is alleged to have included the aiding and abetting of crimes under the New York Penal Law. New York Penal Law Section 20.0 applies to aiding and abetting and provides as follows: Quote, "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct."

Under that definition, mere presence at the scene of a

crime, even with knowledge that the crime is taking place, (or mere association with a perpetrator of a crime), does not by itself make a defendant criminally liable for that crime.

For the defendant to be held criminally liable for the conduct of another that constitutes an offense, you must find beyond a reasonable doubt:

First, that the defendant solicited, requested, commanded, importuned, or intentionally aided that person to engage in the conduct; and

Second, that the defendant did so with the state of mind required for the commission of the offense.

Count One, the RICO conspiracy statute -- excuse me -- the RICO conspiracy count, charges the defendant with conspiring, that is, agreeing, to conduct or participate in the conduct of the affairs of the enterprise known as the Yellow Tape Money Gang -- sorry, I messed that up.

Count One, the RICO conspiracy count, charges the defendant with conspiring, that is, agreeing, to conduct or participate in the conduct of the affairs of an enterprise known as the Yellow Tape Money Gang enterprise through an alleged pattern of racketeering activity consisting of acts involving murder (including conspiracy to murder, attempted murder, and aiding and abetting attempted murder), and acts involving distribution of controlled substances (including distribution of crack cocaine and heroin, possession of crack

cocaine and heroin with intent to distribute, aiding and abetting the same and conspiracy to do the same).

Count One alleges that the defendant conspired to violate the RICO statute, Section 1962(c) of Title 18 of the United States Code, which makes it a crime for, quote:

"Any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity..."

The RICO statute, in essence, makes it a crime for a person to participate in the conduct of an enterprise's affairs through a pattern of certain violation of laws known as "racketeering acts." These alleged violations, or racketeering acts, may be violations of federal or state law, and I will discuss them shortly.

The word "racketeering" may have certain implications in our society. Do not infer anything from it. The use of the term in the applicable statute and here in this courtroom should not be regarded as having anything to do with your determination of whether the guilt of the defendant has been proven beyond a reasonable doubt. The term is merely a term used by Congress to describe the statute.

For Count One, the government must prove beyond a reasonable doubt each of the following elements:

First, that the enterprise alleged in the indictment existed;

Second, that the enterprise affected interstate or foreign commerce;

Third, that the defendant was employed by or associated with the enterprise; and

Fourth, that the defendant willfully and knowingly agreed with at least one other person to participate directly or indirectly in the conduct of the affairs of that enterprise through a pattern of racketeering activity - that is, that either the defendant or a co-conspirator would commit at least two acts of racketeering.

The first element that the government must prove beyond a reasonable doubt is that the alleged enterprise, the Yellow Tape Money Gang - in fact existed.

Under the RICO statute, an enterprise may be a group of people informally associated together for a common purpose of engaging in a course of conduct. This group may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose. In addition to having a common purpose, this group of people must have a core of personnel who function as a continuing unit. It does not have to be a commonly recognized legal entity, such as a corporation, a trade union, a partnership, or the like. The statute makes clear that an enterprise may be "a group of

individuals [who are] associated in fact although not a legal entity." Furthermore, the enterprise must continue to exist in substantially similar form through the period charged. This does not mean that the membership must remain exactly identical, but the enterprise must have a recognizable core that continues during a substantial period within the time frame charged in the indictment.

Here, the enterprise alleged in the indictment to have existed is compromised of members and associates of the Yellow Tape Money Gang, and it is alleged to have existed from at least in or about 2015, up to and including in or about May 2016.

If you find that this was a group of people characterized by (1) a common purpose or purposes, (2) an ongoing formal or informal organization or structure, and (3) core personnel who functioned as a continuing unit during a substantial period within the time frame charged in the indictment, then you may find that an enterprise existed.

The second element that the government must prove beyond a reasonable doubt is that the enterprise was engaged in or it had an effect upon interstate or foreign commerce. Interstate commerce includes the movement of goods, services, and individuals between states.

The government must prove that the enterprise engaged in interstate commerce or that its activities affected

interstate commerce. The enterprise or the racketeering activities of its members must have affected interstate or foreign commerce in some minimal way. The effect need not be substantial; even a minimal effect is enough. Nor is it necessary that the effect on interstate commerce have been adverse. It is not necessary to prove that the acts of the defendant affected interstate commerce, as long as the acts of the enterprise itself had such an effect. It is sufficient, for example, if, in the course of the racketeering activities, members of the enterprise used weapons that had traveled in interstate commerce, trafficked in narcotics, traveled interstate themselves, or used telephone facilities interstate. All narcotics activity, even purely local activity, has an effect on interstate commerce. So if you find that members of the enterprise trafficked in narcotics as part of their membership in the enterprise, you may find this element satisfied.

Finally, the government is not required to prove that the defendant knew he was affecting interstate commerce. All that is necessary is that you find beyond a reasonable doubt that the activities of the enterprise affected interstate or foreign commerce in some minimal way.

The third element the government must prove beyond a reasonable doubt is that the defendant was associated with or employed by the enterprise. It is not required that the

defendant have been associated with or employed by the enterprise for the entire time that the enterprise existed. It is required, however, that the government prove beyond a reasonable doubt that at some time during the period indicated in the indictment, the defendant was associated with or was employed by the enterprise.

A defendant cannot be associated with or employed by an enterprise if he does not know of the enterprise's existence or the nature of its activities. Thus, to prove this element, the government must prove beyond a reasonable doubt that the defendant knew of the existence of the enterprise and of the general nature of its activities, and was connected to the enterprise in some meaningful way.

To satisfy its burden of proof for the fourth element, the government must prove beyond a reasonable doubt that the defendant knowingly and willfully agreed to participate, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity.

The government must prove that the defendant participated in some manner in the overall affairs of the enterprise and the objectives of the conspiracy, and that he did so with the intent that he or another member or members of the enterprise would commit at least two acts of racketeering, of the types specified in the indictment as part of a pattern of racketeering activity. I have previously defined

"knowingly" and "intentionally" at pages 22-23, and you should apply those definitions here. You should also apply by earlier instructions on conspiracy on pages 20-28.

A pattern of racketeering activity requires at least two acts of racketeering committed within ten years of one another, excluding any period of imprisonment after the commission of a prior act of racketeering.

That is a really complicated way of saying they must be committed within ten years -- there must be at least two acts of racketeering committed within ten years of each other, and excluding any period of imprisonment.

To establish an agreement to commit a "pattern of racketeering activity," as alleged in Count One of the indictment, the government must prove three elements beyond a reasonable doubt:

First, that the defendant agreed that a conspirator, which could include the defendant or any other member of the conspiracy, would intentionally commit, or cause, or aid and abet the commission of, two or more racketeering acts of the types alleged in the indictment. At the end of this instruction, I will instruct you on the elements regarding each of the charged categories of racketeering activity.

Second, that the racketeering acts had a "nexus" to the enterprise and the racketeering acts are "related" to one another. A racketeering act has a "nexus" to the enterprise if

it has a meaningful connection to the enterprise. To be "related," the racketeering acts must have the same or similar purposes, results, participants, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics and not be merely isolated events. Two racketeering acts may be "related" even though they are dissimilar or not directly related to each other, provided that the racketeering acts are related to the same enterprise. For example, for both "nexus" and "relatedness" purposes, the requisite relationship between the RICO enterprise and a predicate racketeering act may be established by evidence that the defendant was enabled to commit the racketeering act solely by virtue of his position in the enterprise or involvement in or control over its affairs, or by evidence that the defendant's position in the enterprise facilitated his commission of the racketeering act, or by evidence that the racketeering act benefited the enterprise, or by evidence that the racketeering act was authorized by the enterprise or by evidence that the racketeering act promoted or furthered the purpose of the enterprise.

Third, to establish a pattern of racketeering activity, the government must prove that the racketeering acts themselves either extended over a substantial period of time or they posed or would pose a threat of continued criminal activity. The government need not prove such a threat of

continuity by any mathematical formula or by any particular method of proof, but rather may prove it in a variety of ways. For example, the threat of continued unlawful activity may be established when the evidence shows that the racketeering acts are part of a long-term association that exists for criminal purposes, or when the racketeering acts are shown to be the regular way of conducting the affairs of the enterprise. Moreover, in determining whether the government has proven the threat of continued unlawful activity, you are not limited to consideration of the specific racketeering acts that the defendant himself is alleged to have committed; rather, in addition to considering such acts, you may also consider the nature of the enterprise, and other unlawful activities of the enterprise and its members viewed in their entirety, including both charged and uncharged unlawful activities.

For the government to meet its burden of proof under Count One, the government must prove beyond a reasonable doubt that the defendant intended to further an endeavor which, if completed, would have satisfied all the elements of a substantive racketeering offense. The government is not required to prove that the defendant personally committed or agreed to commit any act of racketeering, nor is it required to prove that any acts of racketeering actually occurred. Rather, the government must prove that the defendant agreed to participate in the enterprise with the knowledge and intent

that at least one member of the racketeering conspiracy, which could be the defendant or a co-conspirator, would commit at least two racketeering acts in the conduct of the affairs of the enterprise and that those acts would constitute a pattern of racketeering activity as defined above.

Let me make clear that an enterprise is not the same thing as a pattern of racketeering activity. To convict a defendant under the RICO conspiracy statute, the government must prove both that there was an enterprise and that the enterprise's affairs were conducted through a person of racketeering activity. As I have mentioned, the enterprise in this case is alleged to be a group of individuals who associated together for a common purpose of engaging in a course of conduct. A pattern of racketeering activity, on the other hand, is a series of criminal acts.

The existence of the enterprise is proved by evidence of an ongoing organization, formal or informal, with a common purpose and by evidence that various core personnel of the group functioned as a continuing unit.

The pattern of racketeering activity, on the other hand, is proven by evidence of a minimum of two acts of racketeering that the participants in the enterprise committed or aided and abetted. The proof used to establish those separate elements may be the same or overlapping. For example, if you find that an ongoing enterprise existed, the existence

of this enterprise may help to establish that the separate racketeering acts were part of a "pattern" of continuing criminal activity. Nevertheless, you should bear in mind that proof of an enterprise does not necessarily establish proof of a pattern of racketeering activity, and vice versa. The enterprise and the pattern of racketeering activity are separate elements that must be proven by the government.

Finally, although you need not decide whether the government agreed to the commission of any particular racketeering act to convict the defendant of the RICO conspiracy offense, you must be unanimous as to which type or types of predicate racketeering activity the defendant agreed would be committed; for example, at least two acts of attempted murder or conspiracy to murder or two acts of drug-trafficking or any combination thereof.

The government is not required to prove either that the defendant agreed to commit two racketeering acts himself or that he actually committed two such acts, although you may consider evidence that he agreed to commit or actually did commit such acts in determining whether he agreed to participate in the conduct of the enterprise. Let me read this sentence again.

Okay. I think the words "from proof" don't belong in there. So, let me try the sentence again.

The government is not required to prove either that

the defendant agreed to commit two racketeering acts themselves or that he actually committed two such acts, although you may consider evidence that he agreed to commit or actually did commit such acts in determining whether he agreed to participate in the conduct of the enterprise through a pattern of racketeering activity.

In other words, what you're being asked to decide in Count One is this: Did the defendant know about the activities of the other members of the conspiracy, and unlawfully, knowingly and willfully join in and participate and contribute in some fashion to the goals of the conspiracy, knowing that he or any of his co-conspirators would commit two or more charged acts of racketeering as part of the conspiracy?

Now, let me turn to the specific racketeering acts charged in Count One and the elements of those acts.

The indictment alleges that the following racketeering acts were or were intended to be committed as part of a conspiracy:

(a) multiple acts involving murder, including conspiracy to murder, attempted murder, and aiding and abetting attempted murder, in violation of New York Penal Law Sections 20.0, 105.15, 110.0, and 125.25; and

(b) multiple offenses involving the distribution of controlled substances, including crack cocaine and heroin, in violation of Sections 812, 841(a)(1), 841(b)(1)(A), and 846 of

Title 18 of the United States Code.

The government must prove that within a ten-year period (excluding any period of incarceration), two acts in violation of these statutes were committed, or intended to be committed by the defendant or a co-conspirator, as part of the charged RICO conspiracy. You will note that each category of predicate offenses includes a violation of more than one specific law. To find that a given predicate offense was an object of the charged RICO conspiracy, you need only find that the object of the conspiracy involved the violation of at least one of the specified statutes, but you must be unanimous as to which one(s).

The defendant is not charged with actual murder, but I will explain the elements for murder under New York Penal Law Section 125.25 so that you may understand conspiracy and attempt to murder.

The elements of murder under New York state law are:

First, that the individual caused the death of the victim or aided and abetted the same; and

Second, that the individual did so with intent to cause the death of the victim or another person.

A person intends to cause the death of another person when his conscious objective is to cause the death of that person. To prove that an individual caused the victim's death, the government must prove that the individual's conduct was a

sufficiently direct cause of the death of the victim or a reasonably foreseeable result of that conduct. Intent does not require premeditation or advance planning, but the intent to cause death must exist at the time the individual engages in the acts that caused death. Furthermore, there's no requirement under the murder statute that the person who is murdered be the same person who was intended to be murdered. Thus, the intent element is satisfied when the perpetrator intends to kill one person but instead kills another person.

In determining whether the defendant agreed as part of the RICO conspiracy that he or a co-conspirator would commit or attempt to commit acts involving murder in violation of New York state law, you may apply the instructions on aiding and abetting I gave you earlier. Thus, you may find that the RICO conspiracy involved acts involving murder either because you find that the defendant agreed that he or a co-conspirator would commit or attempt to commit an act constituting murder under New York law, or because you find that he agreed that he or a co-conspirator would assist a third party in doing so.

New York Penal Law Section 110.00 provides that a "person is guilty of an attempt to commit a crime" - here, murder - "when, with intent to commit that crime, he engages in conduct which tends to effect the commission of such crime." The elements of attempted murder under New York state law are:

First, that the perpetrator intended to kill another

person; and

Second, that perpetrator attempted to cause the death of that person, meaning that the perpetrator engaged in conduct which tended to effect the death of another person.

One is not guilty of an attempt to commit murder under New York state law until on the verge of committing it. Mere preparation is not sufficient. The acts committed by the defendant, or those he is aiding and abetting, are required to carry the project forward within dangerous proximity of the criminal end to be attained.

The defendant is also charged as a predicate racketeering act with conspiracy to commit murder under New York Penal Law Section 105.15. For the government to prove beyond a reasonable doubt that a person conspired to commit murder under New York state law, the government must show:

First, that the individual agreed with one or more other persons to engage in or cause the performance of a murder;

Second, that the defendant did so with the intent that such murder be performed;

Third, that the individual, or one of the people with whom he agreed to engage in or cause the performance of the conduct, committed an overt act in furtherance of the conspiracy.

A person acts with intent that a murder be performed

when his conscious objective or purpose is that the murder should occur.

The agreement to engage in or cause the performance of a crime is not itself an overt act. The overt act must be an independent act that tends to carry out the conspiracy. The overt act can be, but need not be, the commission of the crime that was the object of the conspiracy.

Under New York law, it is no defense to a charge of conspiracy that one or more of the individual's co-conspirators could not be guilty of conspiracy or the object crime, whether because of criminal irresponsibility or other legal incapacity or exemption; unawareness of the criminal nature of the agreement or the object conduct or the defendant's criminal purpose; or other factors precluding the mental state required for the commission of conspiracy or the object crime. In other words, a person may be guilty of conspiracy even though one or more or all of the other parties to the agreement are not guilty of the conspiracy or the murder because of some legal insufficiency or defense.

The indictment alleges a second category of offenses that were committed or intended to be committed as part of the RICO conspiracy: acts involving the distribution of narcotics, possession with intent to distribute narcotics, and conspiracy to distribute and possess with intent to distribute narcotics, specifically crack cocaine and heroin, in violation of those

Sections of Title 21 that I previously read.

Section 846 of Title 21 of the U.S. Code makes it a crime for an individual to conspire with others to violate the narcotics laws of the United States. To be guilty of narcotics conspiracy, the government must prove:

First, that the narcotics conspiracy actually existed; in other words, there was in fact an agreement or understanding to violate those provisions of law that make it illegal to distribute narcotics or to possess narcotics with the intent to distribute them; and

Second, the defendant intentionally and knowingly became a member of the narcotics conspiracy; that is, he knowingly associated himself with the narcotics conspiracy and participated in the conspiracy to distribute or possess with the intent to distribute narcotics.

I have already explained the federal law of conspiracy, and you should apply that law here.

Under Section 841 of Title 21, it is unlawful for any person knowingly or intentionally "to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance." Crack cocaine and heroin are "controlled substances" under the federal statute. The elements of distributing or possessing with the intent to distribute narcotics are:

First, that the defendant or a co-conspirator

distributed a controlled substance or possessed a controlled substance with the intent to distribute it;

Second, that he did so intentionally and knowingly; and

Third, that the substance involved was in fact a controlled substance.

In determining whether the defendant agreed as part of the RICO conspiracy that he or a co-conspirator would commit acts involving the distribution of a controlled substance, you may apply the aiding and abetting instruction I gave you earlier. Thus, you may find that the RICO conspiracy involved the distribution of controlled substances because you find the defendant agreed that either he or a co-conspirator would personally distribute drugs or possess them with intent to distribute, or because you find that he agreed that he or a co-conspirator would assist a third party in doing so.

The legal concept of "possession" may differ from the everyday usage of the term, so let me explain it in some detail.

Actual possession is what most of us think as possession, that is, having physical custody or control of an object, like I possess this pen. If you find that the defendant or a co-conspirator had the controlled substance on his person, then you may find that he had possession of it. A person, however, need not have actual physical possession, that

is, physical custody of an object - to be in legal possession of it. If a person has the ability to exercise substantial control over an object, even if he does not have the object in his physical custody, and that person has the intent to exercise such control, then the person is in possession of that object. This is called "constructive possession."

More than one person can have control over the same narcotics. Moreover, possession and ownership are not the same. A person can possess an object and not be the owner of it.

The word "distribution" means the actual, constructive, or attempted transfer of a controlled substance. To "distribute" means to deliver, pass, or hand over something to another person, or cause something to be delivered, passed on, or handed over to another person. Distribution does not require a sale.

Turning to the definition of "possession with intent to distribute," I begin with the concept of "possession." Possession is pretty much what it sounds like. As I mentioned, actual possession is having physical custody or control of an object, and constructive possession is essentially having control over it, even if not physically possessing it. To "possess with intent to distribute" simply means to have or control a controlled substance with the intent or purpose to "distribute" it to another person or persons. As I said,

"distribute" means simply to transfer to another.

How can you tell whether a person intended to distribute drugs? Because you cannot read a person's mind, usually you must make an inference from his behavior. You cannot find someone guilty, however, unless these inferences convince you beyond a reasonable doubt that the person had the intention to distribute the controlled substance. If someone conspired to obtain drugs for his personal use, rather than for the purpose of distribution or delivery to another, that person would not be guilty of this offense.

It may be possible to infer an intention to distribute from the quantity of drugs that you find were involved, although possession of a large quantity of narcotics does not necessarily mean the possessor intended to distribute them. On the other hand, a person may have intended to distribute a controlled substance even if he did not possess a large amount of it. You should make your decision whether the government has proved beyond a reasonable doubt that the defendant conspired to distribute controlled substances from all of the evidence in the case.

I have previously defined "knowingly" and "intentionally" on pages 22-23, and you should apply those definitions here.

One further point -- one further point on Count One, I guess I should say. If, and only if, you find the defendant

guilty of Count One, and if, and only if, you find that the government has proven beyond a reasonable doubt that the pattern of racketeering activity the defendant agreed would be committed involved acts involving the distribution of controlled substances, you must then determine the type of controlled substance or substances involved in the conspiracy. The government has alleged that the controlled substances involved in the conspiracy were crack cocaine and heroin.

If you conclude, unanimously, that the government has proven beyond a reasonable doubt that the conspiracy alleged in Count One - not as part of Count One - involves crack cocaine, check "YES" in response to the interrogatory regarding that particular controlled substance on the verdict form. (An interrogatory is simply a question.) The government need not prove the purity of the controlled substance; any mixture or substance containing a detectable amount of a controlled substance is sufficient.

There is also a special interrogatory regarding the quantity of crack cocaine involved. You should reach this question only if you have checked "YES" for crack cocaine. You need not determine the precise quantity. If you reach the question of quantity as to crack cocaine, you need only indicate on the verdict form, at least with respect to Count One, I should say, whether the government has established beyond a reasonable doubt that the conspiracy involved 280

grams or more of crack cocaine. Your finding on quantity must be unanimous in the sense that you may not find that the conspiracy involved at least 280 grams or more of crack cocaine unless all of you agree on that fact. The defendant is responsible for the quantity of drugs involved in any transaction in which he personally participated as part of the conspiracy, whether or not he knew the specific quantity and whether or not it was foreseeable to him, and he is also responsible for quantities that the conspiracy as a whole involved, as long as those amounts were known or foreseeable to him and within the scope of the criminal activity he jointly undertook.

Counts Two and Three charge the defendant with committing violent crimes in aid of racketeering activity, in violation of Section 1959 of Title 18 of the United States Code. This explanation will apply to both of these counts.

Count Two charges the defendant with attempting to murder, and aiding and abetting the attempted murder of, individuals affiliated with the Southside gang in aid of racketeering activity. Count Three charges the defendant with assaulting with a dangerous weapon and attempting to murder an individual, and aiding and abetting the assault and attempted murder of that individual in aid of racketeering activity.

The statute relevant to these counts, Section 1959 of Title 18 of the U.S. Code provides that:

Whoever...for the purpose of gaining entrance to, or maintaining or increasing position in, an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assaults resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires to do so, [is guilty of a crime].

To find the defendant guilty of this offense, the government must, prove beyond a reasonable doubt, as to each count each of the following elements:

First, that the enterprise charged in Count One existed, that it engaged in racketeering activity, and that it engaged in or its activities affected interstate or foreign commerce;

Second, that the defendant committed the underlying crime alleged in the count you are considering; and

Third, that the defendant's general purpose in doing so was to gain entrance to the enterprise or maintain or increase his position in the enterprise.

I have already defined for you in connection with Count One the concepts of the "enterprise," "affecting interstate commerce," and "racketeering activity," and you should apply those instructions here. If you find beyond a reasonable doubt that the enterprise did exist, affected

interstate commerce, and engaged in racketeering activity as described in Count One, then you must go on to consider the other elements of the charges in Counts Two and Three.

The second element of Counts Two and Three is that the defendant committed or aided and abetted the underlying violent crime alleged in the count you are considering - attempted murder for Count Two, and assault with a dangerous weapon and attempted murder for Count Three.

I have previously instructed you on the elements of attempted murder under New York State law at pages 39-40, and you should follow those instructions for the counts that allege these crimes.

With respect to Count Three, the elements of assault with a deadly weapon are:

First, that the perpetrator intended to cause physical injury to another person; and

Second, that in accordance with that intent, the perpetrator caused physical injury to that person or a third person by means of a deadly weapon or dangerous instrument.

Under the assault statute, a person intends to cause physical injury to another person when his conscious objective is to cause physical injury to another person. "Physical injury" means impairment of a person's physical condition or substantial pain.

Under the assault statute, there is no requirement

that the person who is injured be the same person who was intended to be injured. Thus, the intent element is satisfied when the perpetrator intends to physically injure one person, but instead physically injures another person.

A "deadly weapon" is any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged. For a firearm to be considered a "deadly weapon," it must be loaded and operable, although there is no requirement that the defendant knew it was loaded or operable at the time he possessed it. "Loaded" means that the firearm is loaded with ammunition that may be used to discharge such firearm.

A "dangerous instrument" is any instrument, article, or substance that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury, although death or other serious physical injury may not, in fact, be caused.

The third element the government must prove beyond a reasonable doubt is that the defendant's purpose in committing the underlying crime was to gain entrance to the Yellow Tape Money Gang enterprise, or to maintain or increase his position within that enterprise. Your focus on this element is on the general purpose of the defendant. The government does not need to prove that gaining entrance to or maintaining or increasing

position in the enterprise was the defendant's sole or principal motive, so long as one of the those purposes was a substantial motivating factor in the defendant's decision to participate in the underlying crime or crimes. For example, this element is satisfied if you find that the defendant committed the underlying crime because he knew it was expected of him by reason of his membership in or association with the enterprise, because it would maintain or enhance his position or prestige in the enterprise, or, with respect to a high-ranking member of the enterprise, if he committed or sanctioned the act of violence to protect the enterprise's operations or advance its objectives. This element could also be satisfied if you find that the defendant committed the underlying crime to enhance his reputation or wealth within the enterprise or to avoid losing power or prestige within the enterprise. This list of examples is not exhaustive. It may be exhausting, but it's not exhaustive.

You may evaluate the guilt of the defendant on Counts Two and Three under an aiding and abetting theory and a theory of *Pinkerton* liability. I have previously instructed you on those theories at pages 27-30, and you should follow those instructions with respect to these counts.

Give me one second. Actually, 27-30 is just -- right. Never mind. I take it back.

Moving on to Count Four - we're getting there.

Count Four charges the defendant with participating in a conspiracy from in or about 2015, up to and including in or about May 2016, to violate the narcotics laws of the United States - specifically, engaging in a conspiracy to distribute crack cocaine or possess crack cocaine with intent to distribute it.

I have instructed you generally on the elements of conspiracy at pages 20-28 and specifically on drug-trafficking conspiracy in connection with Count One at pages 41-45, and you should follow those instructions here.

If, and only if, you find the government has proven beyond a reasonable doubt that the defendant participated in the conspiracy charged in Count Four - regardless of whether you find the defendant guilty of Count One - you must then determine the quantity of crack cocaine involved in the conspiracy. In completing the special interrogatories on drug quantity in connection with Count Four, you should follow the instructions on completing the special interrogatory on drug quantity that I gave you in connection with Count One, except here, rather than simply indicating whether the government has proven beyond a reasonable doubt that the conspiracy involved at least 280 grams of crack cocaine, you'll be given three choices. You'll be asked to indicate if the government has proven the conspiracy involved at least 280 grams of crack cocaine, at least 28 grams of crack cocaine, or less than 28

grams of crack cocaine.

Your finding on quantity must be unanimous in the sense that all of you must agree that the conspiracy involved at least the quantity you indicate. Thus, for example, if all of you agree the conspiracy involved 280 grams or more of mixtures and substances containing a detectable amount of crack cocaine, you should indicate that on the verdict form. If, however, some of you conclude that the conspiracy involved 28 grams or more, but the rest of you conclude that it involved 280 grams or more, you must indicate 28 grams or more on the verdict form, because all of you would only be in agreement that the conspiracy involved 28 grams or more of crack cocaine. Similarly, if you conclude that the government has proven that the conspiracy involved a detectable amount of crack cocaine, but you cannot agree that the government has proven any particular amount, you must check the box for "Less than 28 grams" on the verdict form. If you conclude that the government has not proven beyond a reasonable doubt that the conspiracy involved at least 28 grams of crack cocaine, then you may also indicate that on the verdict form. Actually, disregard that last sentence.

You have to be unanimous as to the amount involved. And if some of you think it was at least 28, and others think it was at least 280, you have to default back to 28; and the same thing if some of you believe it was at least 28, and some

of you believe it was less than 28, in that case, you would have to default back to less than 28.

Count Five charges the defendant with using a minor in the commission of a drug offense, in violation of Section 861(a)(1) of Title 21 of the U.S. Code. For the defendant to be guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that at or about the time charged in the indictment, the defendant was at least 18 years old;

Second, that the defendant knowingly and intentionally employed, hired, used, persuaded, induced, or enticed a minor in the commission of the underlying drug offenses; and

Third, that the minor was under the age of 18 years.

I've previously instructed you on the meaning of "knowingly" and "intentionally." You should apply those definitions here.

The government is not required to prove that the defendant knew the age of the minor or that he was under 18.

Count Six alleges a violation of Section 924(c) of Title 18 of the United States Code, which provides that:

Any person who, during and in relation to any crime of violence or drug-trafficking crime...for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be guilty of a crime].

Count Six charges that the defendant knowingly used and carried firearms and aided and abetted the same during and in relation to the racketeering conspiracy charged in Count One and the narcotics conspiracy charged in Count Four of the indictment. This means that if you find the defendant is not guilty of both the racketeering conspiracy in Count One and the narcotics conspiracy in Count Four, then you cannot consider Count Six.

To find that the defendant personally committed the Section 924(c) firearms offense charged in Count Six, the government must prove beyond a reasonable doubt each of the following elements for each count -- actually, there's only one count -- each of the following elements:

First, that on or about the date or dates alleged in the indictment, the defendant used or carried or possessed a firearm;

Second, that on those occasions, the defendant used or carried the firearm during and in relation to a crime of violence or drug-trafficking crime, or possessed the firearm in furtherance of those crimes; and

Third, that the defendant acted knowingly and unlawfully.

The first element the government must prove beyond a reasonable doubt is -- we dropped a word -- is that on or about the date set forth in the indictment, the defendant used or

carried or possessed a firearm.

A firearm under Section 924(c) means "any weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." Common sense tells you that a gun meets the statutory definition of a firearm. It does not matter whether the gun was loaded or operable at the time of the crime.

"Use" of a firearm means active employment of the firearm by the defendant. This does not mean the defendant must actually fire or attempt to fire the weapon, although those would obviously constitute use of a weapon. Brandishing, displaying, or even referring to the weapon so that others know the defendant has the firearm available if needed all constitute use of the firearm. But the mere possession of a firearm at or near the site of the crime without active employment as I just described it is not sufficient to constitute use of the firearm.

"Carrying" a firearm is different from "using" it. While use requires active employment of a firearm, "carrying" does not. A person "carries" a firearm when he knowingly holds, moves, conveys, or transports it in some manner on his person, in a bag, or other container, or in his vehicle.

Possession of a firearm means that the defendant either had physical possession of the firearm on his person or that he had dominion and control over the place where the

firearm was located, and had the power and intention to exercise control over the firearm. Mere presence in a place where the firearm is located is not enough. A person need not have physical custody of an object to be in legal possession of it, so long as he has the ability to exercise substantial control over an object and the intent to exercise -- actually, it shouldn't say the object, it should say the firearm. So, let me read that again.

A person need not have physical custody of a firearm to be in possession of it, to be in legal possession of it, so long as he has the ability to exercise substantial control over the firearm and the intent to exercise such control, and the firearm is immediately available to him. More than one person can have control over the same firearm. The law recognizes that possession may be sole or joint.

Control over an object may be demonstrated by the existence of a relationship between one person having the power or ability to control the item, and another person who has the actual physical custody. The person having control "possesses" the firearm because he has a relationship with the person who has actual physical custody of the firearm and because he can direct the movement or transfer or disposition of the firearm. In addition, an individual may have possession of an item that is not found on his person because that individual has a relationship to the location where the item is maintained. In

this matter, for example, a business person may legally possess things that are scattered throughout a number of stores or offices or installations around the country.

The second element that the government must prove beyond a reasonable doubt is that the defendant used or carried a firearm during and in relation to a crime of violence or a drug-trafficking crime, or possessed a firearm in furtherance of such crime. The racketeering conspiracy charged in Count One qualifies as a crime of violence and the narcotics conspiracy alleged in Count Four qualifies as a drug-trafficking offense.

The phrase "during and in relation to" should be given its ordinary meaning.

"Possessed a firearm in furtherance of a crime" requires both that the defendant had possession of the firearm - either physically because it was within his dominion and control - and that such possession helped forward, advance, or promote the commission of the crime or was an integral part of the crime. The mere possession of the firearm at the scene of the crime is not sufficient under this definition. The firearm must have played some essential part in furthering the crime for this element to be satisfied on the basis of the defendant's possession of the firearm.

The final element the government must prove beyond a reasonable doubt for Count Six is that the defendant knew that

he was carrying or using a firearm during and in relation to the underlying crime, or knew that he was possessing a firearm in furtherance of the underlying crime, and that the defendant acted unlawfully and knowingly in doing so. I've already defined "unlawfully" and "knowingly."

To satisfy this element, you must find that the defendant had knowledge that what he was carrying or using or possessing was a firearm as that term is generally used. The government must also prove that the defendant knew what he was doing - that he knew that he was carrying or using a firearm during and in relation to the commission of a crime of violence or a drug-trafficking crime or that he was possessing a firearm in furtherance of those crimes. It is not necessary, however, for the government to prove that the defendant knew that he was violating any particular law.

A defendant may be found guilty of violating Section 924(c), which is the statute underlying Count Six under an aiding and abetting theory or under a *Pinkerton* theory, as described in my instructions at pages 27-30. In addition, I must give you some specific instructions regarding aiding and abetting as it applies to this count only.

To convict the defendant of aiding and abetting the crime charged in Count Six, you must find that the defendant facilitated either the use, carrying, or possession of the firearm or the commission of the charged violent crime or

drug-trafficking crime. It is not necessary that the defendant facilitate both of the possession, use, or carrying of the firearm and the crime of violence or drug-trafficking crime.

To convict the defendant of this offense on an aiding an abetting theory, you must also find that the defendant had advance knowledge, that a participant in the crime of violence or drug-trafficking crime would use, carry, or possess a firearm in furtherance of the crime of violence or drug-trafficking crime. Advance knowledge means knowledge at a time when the defendant can attempt to alter the plan or withdraw from it. Knowledge of the gun may, but does not have to, exist before the underlying crime is begun. It is sufficient if the knowledge is gained in the middle of the underlying crime, so long as the defendant continues to participate in the crime and has a realistic opportunity to withdraw from it. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant continued his participation in the crime after learning about the use, carrying, or possession of a gun by a co-conspirator.

In other words, as to aiding and abetting the offense charged in Count Six, the government must prove beyond a reasonable doubt that the defendant facilitated either the use, carrying, or possession of the firearm, or the commission of the charged crime of violence or drug-trafficking crime, and

had knowledge of the firearm when he still had a realistic opportunity to withdraw from the crime of violence or drug-trafficking crime.

If you find the defendant guilty on Count Six, you must indicate in the space provided on the verdict form whether you find that the government has proven beyond a reasonable doubt that the defendant is responsible for brandishing and/or discharging a firearm during the use, carrying, or possession of the firearm. Your finding as to the fact you are considering must be unanimous in the sense that all of you must agree that the defendant is responsible for brandishing and/or discharging a firearm.

You must unanimously -- well, that sentence -- the next sentence is just repetition. That's just a mistake.

You should apply here my federal aiding and abetting instructions and my instructions regarding *Pinkerton* liability at pages 27-30.

"Brandish" means that all or part of the weapon was displayed or the presence of the weapon was otherwise made known to another person, to intimidate that person, regardless of whether the weapon was directly visible to that person. The weapon does not have to be directly visible, but it must be present.

A defendant is guilty of aiding and abetting the brandishing of a firearm if he is guilty of a firearms offense,

and if he had advance knowledge that another participant in a crime of violence or drug-trafficking crime would display the firearm or make the presence of the firearm known for purposes of intimidation.

To "discharge" means to fire or shoot, whether intentionally or accidently. To aid and abet the possession or carrying of a firearm that was discharged, the defendant need not have advance knowledge that the discharge would occur. If you conclude that the defendant is guilty of Count Six and that the firearm or firearms in question were discharged, you should check "YES" next to the line for "discharged" on the verdict form.

Count Seven charges the defendant with tampering and attempting to tamper with a witness, in violation of Section 1512 of Title 18 of the United States Code, which provides, in relevant part, "Whoever corruptly...obstructs, influences, or impedes any official proceeding, or attempts to do so," shall be guilty of the offense.

To prove tampering with a witness, the government must prove the following elements beyond a reasonable doubt:

First, that on or about the dates alleged in the indictment, an official proceeding was pending, was about to be instituted, or was reasonably foreseeable to the defendant; and

Second, that the defendant obstructed, influenced, or impeded that official proceeding, or attempted to do so; and

Third, that the defendant acted corruptly.

The first element the government must prove is that on or about the dates alleged in the indictment, an official proceeding was pending, about to be instituted, or reasonably foreseeable to the defendant.

An official proceeding means a proceeding before a court, judge, grand jury, or federal agency. The law does not require the proceeding to be pending at the time of the defendant's actions as long as the proceeding was foreseeable such that the defendant knew that his actions were likely to affect the proceeding.

A federal criminal case pending before the Court is an official proceeding within the meaning of this statute.

The second element that the government must prove beyond a reasonable doubt is that on or about the dates alleged in the indictment, the defendant obstructed, influenced, or impeded that official proceeding, or attempted to do so.

To obstruct, influence, or impede an official proceeding, or attempt to do so, the defendant's actions must have a relationship in time, causation, or logic to the relevant proceedings. It is not necessary for the defendant to know with certainty that his conduct would affect the official proceeding, nor is it necessary that the defendant's conduct actually obstructs or influences the official proceeding. It is sufficient that the defendant's actions would have the

natural effect of interfering with the official proceeding.

The third element that the government must prove beyond a reasonable doubt is that on or about the dates alleged in the indictment, the defendant acted corruptly in doing so. To act corruptly means to act with an improper purpose and to engage in conduct knowingly and dishonestly and with the intent to obstruct, impede, or influence the due administration of justice.

I have now told you the elements of the charges in the indictment. I hope your heads aren't spinning. In addition to the elements I have described to you, the government, as to each charge, must prove that this prosecution has been brought properly in the Southern District of New York where we now sit. The Southern District of New York includes Orange County, which includes Newburgh, and the Southern District includes Westchester County, which includes the Westchester County jail in Valhalla, New York.

I note on the issue of venue and on this issue alone, the government need not prove its position beyond a reasonable doubt. It is sufficient if the government proves venue by a mere preponderance of the evidence. A proposition is proven by a preponderance of the evidence if you conclude that it is more likely true than not.

If you find that the government has failed to meet this venue requirement with regard to any of the charges, you

must acquit the defendant of that charge.

In a few minutes, you will go into the jury room and begin your deliberations. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for yourself, but you should do so only after consideration of the case with your fellow jurors. Your verdict, and the answers to each question on the verdict form, must be unanimous. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without prejudice or favor toward any party, and adopt that conclusion which in your good conscience appears to be in accordance with the evidence.

As you deliberate, please listen to the opinions of your fellow juror and ask for an opportunity to express your own views. Every juror should be heard. No one juror should hold center stage in the jury room, and no one juror should control or monopolize the deliberations. You should all listen to one another with courtesy and respect. If, after stating your own view, and if, after listening to your fellow jurors, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride to change your view. On the other hand, do not surrender your honest opinions and beliefs concerning the weight or effect of the evidence solely because of the opinions of your fellow jurors or because you are outnumbered or for the mere purpose of returning a verdict.

Your final vote must reflect your conscientious belief as to how the issues should be decided. Your verdict must be unanimous.

You are not to discuss the case until all jurors are present. Nine, ten or even eleven jurors together is only a gathering of individuals. Only when all 12 jurors are present do you constitute a jury and only then may you deliberate.

Your first task when you retire to deliberate is to vote on one of you to sit as your foreperson. The foreperson does not have any more power or authority than any other juror, and his or her vote or opinion does not count for any more than any other juror's vote or opinion.

The foreperson is merely your spokesperson to the Court. He or she will send out any notes, and when the jury has reached a verdict, he or she will notify the marshal that the jury has reached a verdict, and he or she will come into open court with the other jurors and give the verdict.

The foreperson will receive the verdict form on which to record your verdict. You will also each have copies of the verdict form. It lists the questions you must resolve based on the evidence and the instructions that I have given you.

When the foreperson has completed the form to reflect the unanimous decisions of the jury, he or she must sign the form and the form will be marked as a Court Exhibit.

The exhibits will be sent to you in the jury room,

except for the drugs, guns, and ammunition, and also, I am told, except for Government Exhibit 213, which is the video of the white car. That requires special software that we were unable to load into the laptop that you will have in the jury room. So, you'll be able to listen to and view all of the recordings except for Exhibit 213 on that laptop that we're going to send back with you. If you want to see 213, you can come back in the courtroom. So, 213, the drugs, the guns and the ammunition will be available to you in the courtroom if you wish to review them.

If you want any of the testimony read back to you, that can be arranged. Please appreciate that it is not always easy to locate the testimony you might want, so be as specific as you possibly can as to what witness and what portion of that witness' testimony you would like to hear.

Any communication with the Court should be made in writing, signed by your foreperson, and given to the marshal, who will be outside the jury room door while you deliberate. I will respond to any questions or requests you have as promptly as possible, either in writing or by having you return to the courtroom so I can speak to you in person. But please appreciate that I have to share your notes with the lawyers, and they will have opinions as to how I should respond, so don't expect an instantaneous response if you have a question.

If at any time you are not in agreement, you are not

to reveal the standing of the jurors - that is, the split of the vote - to anyone, including me, at any time during your deliberations. So do not ever indicate, in a note or otherwise, what the vote is or which way the majority of leaning or anything like that. Nobody outside the jury should know how the jury stands on any issue until a unanimous verdict is reached.

If you took notes during the course of the trial, you should not show your notes to or discuss your notes with any other juror during your deliberations.

Any notes you have taken are to be used solely to assist you. The fact that a particular juror has taken notes entitles that juror's views to no greater weight than those of any other juror.

Further, your notes are not to substitute for your recollection of the evidence in the case. If you have any doubt as to any testimony, you may request that the testimony be read back to you, as I mentioned a moment ago.

Under your oath as jurors, you are to evaluate the evidence calmly and objectively, without prejudice or sympathy. You are to be completely fair and impartial. You are to be guided solely by the evidence or the lack of evidence in the case, and the crucial bottom-line question you must ask yourself as you sift through the evidence is, "Has the government proven the elements of the crimes charged in each

count beyond a reasonable doubt?"

It would be improper for you to consider, in deciding the facts of the case, any personal feelings you may have about the race, religion, national origin, sex, sexual orientation, disability, or age of any party or witness, or any other such irrelevant factor. It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process.

All parties are entitled to the same fair trial at your hands. They stand equal before the law and are to be dealt with as equals in this court. If you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

The most important part of this case, Members of the Jury, is the part that you as jurors are about to play as you deliberate on the issues of fact.

It is for you and you alone to decide whether the government has proven beyond a reasonable doubt each of the essential elements of the crimes with which the defendant is charged. If the government has succeeded on a particular count, your verdict should be guilty as to that count. Another typo. If it has failed, your verdict should be not guilty.

I know you will try the issues that have been presented to you according to the oath that you have taken as

jurors. In that oath, you promised that you would well and truly try the issues in this case and render a true verdict according to the law and the evidence.

As I previously stated, your verdict must be unanimous. Again, if at any time you are not in agreement, you are not to reveal the standing of the jurors - that is, the split of the vote - to anyone, including me, at any time during your deliberations.

Now, let me ask your patience for a few moments longer. I have to spend a few moments with counsel at the side bar. I'll ask you to remain where you are without talking, and I will be back in a minute.

(At the side bar)

THE COURT: Did I mess anything up?

MR. BRAVERMAN: I don't think so. I just had one question.

MS. COMEY: We have nothing.

MR. BRAVERMAN: On the verdict sheet, and I'm just tired, so maybe I'm confused, but on the verdict sheet, with respect to brandish and discharge, I believe in reading and listening to it again, is it clear that they don't have to decide brandish or discharge; that they, like, the drugs, they can be less than 28 grams or they can be a -- just use -- take a look at the verdict form really fast.

THE COURT: It says, "If you find him guilty on Count

Six, please indicate if you also found him responsible..."

MR. BRAVERMAN: "Also" is in there.

THE COURT: It's on the verdict form.

MR. BRAVERMAN: On the verdict form. Perfect. That's what I want.

THE COURT: I see what you're saying. You want me --

MR. BRAVERMAN: Because the instruction I think doesn't say the "also" thing.

THE COURT: You want me to tell them that on Count Six, they have three options: They can find he's guilty of Count Six without brandishing or discharging --

MR. BRAVERMAN: Yes.

THE COURT: He's guilty of Count Six, and he also brandished, or he's guilty of Count Six, and he also discharged?

MR. BRAVERMAN: Exactly.

THE COURT: Or there's actually four. He brandished and discharged.

MR. BRAVERMAN: Yes; I guess that true.

THE COURT: Okay. It's clear in the verdict form, but it may not have been clear on what I said, so I'll just tell them that. That's fine.

MR. BRAVERMAN: Other than that, no objections.

THE COURT: Okay.

(In open court)

THE COURT: Just one clarification on note six. I'm not sure if I made this clear.

You're going to first be asked whether you find the defendant guilty on Count Six. If you do, then you'll have to consider whether the firearm was brandished and whether it was discharged.

So, on Count Six, you have four options -- well, five, actually: You have, He's not guilty of Count Six. You have, He's guilty of Count Six. You have, He's guilty of Count Six and he's responsible for brandishing. You have, He's guilty of Count Six and the firearm was discharged. Or you have, He's guilty of Count Six and it was both brandished and discharged.

So, I just want to make clear that if you find the defendant guilty of Count Six, then you'll go on to consider brandishing and discharge, but you don't get to that unless you find the defendant guilty of Count Six. And as with any other decision you're making here on this verdict form, you have to be unanimous.

So, if some of you think that the firearm was discharged and others of you think not, then you can't check the box for discharge; you can only check it if you all agree.

So, I hope that didn't make things more confusing. So, that is it for the instructions. And now comes the part that I always dislike, which is saying good-bye to the alternates.

At this time, the regular jurors are going to begin their deliberations in the case. Nevertheless, you alternates are not quite excused. While the jury conducts its deliberations, you do not have to be in court, but you should make sure Ms. Cama has numbers where you can be reached, because it is possible that one or more of you could be needed to deliberate if a regular juror becomes unable to continue.

Ms. Cama will call you if deliberations are completed without our needing you so that you know when you are completely finished.

Between now and then, however, you must continue to observe all of the restrictions on which I have instructed you throughout the trial; that is, you must not discuss the case with anyone, including your fellow alternate jurors, the regular jurors, other people involved in the trial, members of your family, friends, co-workers, or anyone else. Do not speak at all with any of the parties, witnesses, or attorneys. Do not permit anyone to discuss the case with you. Do not remain in the presence of anyone discussing the case.

If anyone approaches you and tries to talk to you about the case, please report that to me through Ms. Cama immediately. Do not listen to or watch or read any news reports concerning the trial, if there were to be any. Do not do any research on the Internet or otherwise. And do not visit any places mentioned during the trial or conduct any kind of

investigation on your own.

Should you be asked to come back to participate in reaching a verdict in this case, the only information you will be allowed to consider in deciding the case is what you learned in this courtroom during the trial. I'm sorry that you will probably miss the experience of deliberating with a jury, but the law provides for a jury of 12 persons in this case.

Now, we are going to swear the marshal, and then you can all go back to the jury room together. The alternates should take their belongings and say their good-byes. The regular jurors should not deliberate until the alternates have departed.

Let me ask the marshal to come forward to be sworn.

(Marshal sworn)

THE CLERK: State your name for the record.

THE MARSHAL: Carlos Bedoya, B-E-D-O-Y-A.

THE COURT: All right, ladies and gentlemen. After weeks of hearing me say "Don't discuss the case," I'm now going to ask the first 12 of you, once the four alternatives are gone, to begin discussing the case.

I assume you'll go at least until 5:00 today. If you want to stay a little later, that's okay. If I haven't heard from you, I will call you out at 5:00 just to say good evening and to find out what schedule you want to sit tomorrow. Again, there is no time pressure here. You should take as much time

as you need to consider everything that's been put before you in terms of evidence and law.

In a moment, Ms. Cama is going to bring back the exhibits, and she will also bring back the verdict sheet and copies for all of you.

And I think when you've had a chance to look over the verdict sheet, that will help you focus on your task and help you organize your deliberations.

With that, good-bye to the alternates. Thank you very much for your service. You are off the hook for jury duty for four years, at least in this court.

And the rest of you, the 12 regular jurors, as soon as the alternates have departed, you can begin your deliberations.

Thank you.

(Alternate jurors are excused)

(At 3:10 p.m., the jury retired to deliberate)

(Jury not present)

THE COURT: The government, if you're not going to be at your desks, give Ms. Cama your cell numbers.

And Mr. Braverman, if you're going to not be on the sixth floor, give Alice your cell so she can track you down, but don't go far.

MR. BRAVERMAN: I promise.

THE COURT: Thank you all.

MS. COMEY: Thank you, your Honor.

THE CLERK: Have both sides put on the record with the court reporter that all the exhibits that are supposed to go in are there and going in; and nothing that's not supposed to be in is there and not going in?

MR. BRAVERMAN: I'll get my stipulation now --

THE CLERK: Because I can't give them exhibits until you do that.

MR. BRAVERMAN: Someone is going to unlock the door for me?

THE COURT: But you've looked at what the government proposes to send in and it's fine?

MR. BRAVERMAN: Yes. That's fine.

THE COURT: All right. So it's just Exhibit D.

MR. BRAVERMAN: Exhibit D.

THE COURT: So Alice, he needs you to unlock --

THE CLERK: I'm going to get the keys.

(Pause)

MR. BRAVERMAN: I have conferred with the government. We have examined the exhibit lists. And all the items that the Judge indicated that are in the exhibit cart are, in fact, in the exhibit cart. The only thing left is the contraband and the disk for the video that cannot be viewed on the laptop.

MS. COMEY: Which is Exhibit 213.

(Recess pending verdict)

(In open court; jury not present)

THE COURT: We have a note that we have marked as Court Exhibit 5. Court Exhibit 4 will be the charge.

It reads as follows: "We, the Jury, request the testimony of Laquan Falls and Brendan Germaine. We would also like more clarification on the ages of David Brown and Armad Evans during the time of the investigation." And it's signed by Ms. Alexandre, who is Juror No. 1.

So they obviously don't understand how it works. We're clearly not going to read back Laquan Falls and Brendan Germaine. We'd be here for a week.

But I think overnight, the parties can redact out the side bars and objections that were sustained, and we can give it to them in the morning. Or I can call them back out and tell them you don't really want us reading the whole thing, come up with something more specific, but my impression is that they want a transcript, because I don't think they really want a full read-back.

What do you think on that?

MR. BRAVERMAN: I agree with the Court. And the government also reminded me that Police Officer Rodriguez did speak on the subject of David Brown and Armad Evans on pages 96 to 97. That's only two pages there. It's fairly short. There may be a second one. I will look again. Laquan Falls runs about 187 pages, and Mr. Germaine runs about -- more than

300 --

THE COURT: Well, I guess --

MR. BRAVERMAN: -- at least.

THE COURT: I say we can prepare the transcript. That is my way of saying the government can prepare the transcript.

MS. COMEY: Yes, your Honor. We're happy to do so.

THE COURT: So within the transcript of Falls and Germaine, there's testimony about the ages of Brown and Evans.

MS. COMEY: Yes, your Honor.

THE COURT: And the only other witness who talked about it was --

MS. COMEY: Was Detective Rodriguez. There's also information that's relevant to this point within the broader Facebook extracts that are admitted in evidence. So, we would propose a few pages to direct their attention to, as well. We can come up with those at the same time that will we're putting together the transcripts.

THE COURT: So, why don't I tell them that we'll have the full transcripts of Falls and Germaine in the morning, that they both spoke about the ages of Brown and Evans, and that we will also give them the excerpts of Rodriguez -- it was Detective Rodriguez --

MS. COMEY: Yes, your Honor.

THE COURT: -- who spoke about the ages of one of them or both of them?

MS. COMEY: I believe both of them, your Honor, though I need to check to confirm.

MR. BRAVERMAN: I found Evans, but I haven't found Brown yet, but I just looked.

THE COURT: All right. And that we will also have for them in the morning particular pages of Facebook posts that are relevant. So, I could call them out and tell them or I could just write them a note. Why don't I write them a note.

MR. BRAVERMAN: Well, it's already 4:40. I don't know when the Court intends to keep them today anyway.

THE COURT: I was going to have them come out at 5:00. I guess I can have them come out now and tell them what we plan to do. I can ask them how long they want to stay, and if they say they want to leave at 5:00, I can tell them leave when you're ready.

You want to have them come in.

(Jury present; time noted: 3:43 p.m.)

THE COURT: Hi, ladies and gentlemen.

I read your note. Assume when you say you want the testimony of Laquan Falls and Brendan Germaine, you don't want us sitting here for days while we read it back; you want a transcript of it?

A JUROR: Yes.

THE COURT: We can do that, but we have to go through it and redact out all the side bars, all the discussion that

took place while you were in the jury room, all the objections that were sustained. So we will do that tonight and have that for you in the morning.

You also asked for more clarification on the ages of David Brown and Armad Evans during the time of the investigation. Falls and Germaine both mentioned that issue during their testimony. In addition, Detective Rodriguez mentioned the ages of one or both of them. We'll have that for you in the morning. And in addition, there are Facebook pages relevant to that issue and we will, in the morning, be able to direct you to particular Facebook pages.

So I can't summarize any evidence for you or clarify anything for you, but I can, with the aid of the lawyers, point you to evidence that's relevant on that subject, and we'll have that for you in the morning.

Have you thought about how long you want to stay tonight?

A JUROR: 5:00.

THE COURT: So, unless you have another note when it gets to be 5:00, you don't have to come back out here, just depart, and tomorrow you want to come at --

A JUROR: 9:30.

THE COURT: And you'll stay until 5:00 or until you finish? That's fine. We will have this all ready for you at 9:30 hopefully.

So you can resume your deliberations now and go until 5:00 and then depart. But just remember, it is as important as ever, maybe even more so that you not talk about the case with anyone except each other. Don't do any research, don't look anything up. Don't expose yourself to anything relating to the case outside the courtroom. Don't let anyone try to talk to you about it. In the morning, don't start discussing the case until all 12 of you are present.

And we'll have the coffee waiting for you and Alice tells me tomorrow we're going to try something different for lunch. That will be the thrill to look forward to.

So, unless you have anymore questions between now and 5:00, I'll see you in the morning. Have a good evening.

(Jury deliberations resumed; time noted: 3:46 p.m.)

THE COURT: So logistically, I guess it's easy in the sense that it's going to be the entire testimony of Brown and Evans. We just need to take out the side bars, the sustained objections.

The government is going to do that tonight.

MS. COMEY: Yes, your Honor.

THE COURT: Can you send it to Mr. Braverman so he can look at it tonight?

MR. BRAVERMAN: I'll try to come up with a list as well, and we have everybody's cellphone numbers. We'll stay in touch.

THE COURT: Why don't we reconvene at 9:15, just to make sure we're on the same page.

MS. COMEY: How many copies would you like us to prepare, assuming we agree on redactions?

THE COURT: That's a good question.

MR. BRAVERMAN: When you say -- three or four is enough. I don't think we need 12.

THE COURT: I don't think they really need 12. Why don't we send in three, and we can tell them if they want more, we'll make more. I just don't want to kill too many trees.

I'm looking at Rodriguez's testimony.

MS. COMEY: I believe page 95 and 97 contain the relevant testimony.

THE COURT: Page 95 refers back to something, because the question is, you said about Armad Evans being about age 17, so there must have been something before that.

Unless the premise of the question --

MS. COMEY: It's 94. I apologize, your Honor. It begins on 94:

"Were you also able to learn his date of birth?"

"Yes."

"How old was he at the time?"

"17."

THE COURT: So, 94-95. And then 97, I got to say, that is hearsay, but there was no objection. I guess it's in

there.

MR. BRAVERMAN: My *voir dire*?

THE COURT: No. The question was:

"From your internal system, were you able to determine how old he was?"

"Yes."

"How old was he?"

"17."

I mean, what the internal system says is hearsay, but there was no objection.

MS. COMEY: Your Honor, I would proffer I believe we could have laid a foundation that it was business records, the internal system of the City of Newburgh Police Department had such an objection been made.

THE COURT: Well, there was no objection, so it's in the transcript.

I'm not sure Rodriguez would have been able to say that the information about Mr. Brown's date of birth that was in there came from someone with knowledge, but he might have been able to. I don't rule it out. But you couldn't have a cop testify, I ran the plate and it's registered to so-and-so. That's hearsay, and this is similar. Although, maybe the officer could have laid the foundation. But there was no objection, and there's no, I don't think, argument that David Brown wasn't 17 at the time. It's in the record, so they'll

consider it.

Are the Facebook pages you're talking about ones that have not been cut out? They're somewhere on those disks?

MS. COMEY: Yes, your Honor. So, we would need to look through and figure out where they are, but we would send pages to Mr. Braverman for him to consider.

THE COURT: Is there a way to search them so you get all of them?

MS. COMEY: They are searchable by a Control F function, so to the extent you want to --

THE COURT: So, you can put in "birthday, age 18." All right. If the search captures everything, that would be too bad, but Mr. Braverman should feel -- you should propose search terms.

MR. BRAVERMAN: Yes.

THE COURT: I assume the government has some in mind.

MS. COMEY: Yes, your Honor.

THE COURT: But if they're all going to search birthday or 18, if you can think of other words you'd like them to search, let them know early.

(Continued on the following page)

MR. BRAVERMAN: Absolutely.

THE COURT: All right. I'll see you at 9:15.

MR. BRAVERMAN: Thank you.

THE COURT: Thank you.

(Jury excused; time noted: 5:00 p.m.)

(Continued on next page)

(Adjourned to September 19, 2017 at 9:15 a.m.)

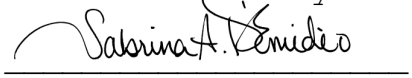
* * *

- - -

Certified to be a true and correct

transcript of the stenographic record

to the best of my ability.



U.S. District Court
Official Court Reporter